“GORSIA & ASSOCIATES”
CS ANJALI GORSIA
Email id:csanjali.gorsia@gmail.com

INSOLVENCY AND RESOLUTION AND LIQUIDATION FOR CORPORATE PERSONS. (I)

In this article, the author specifically discusses about the Section 4 to 32 of Chapter I of Part II of the Insolvency and Bankruptcy Code, 2016 dealing with **INSOLVENCY AND RESOLUTION AND LIQUIDATION FOR CORPORATE PERSONS.**

This part of the code deals with the insolvency resolution and liquidation of “**CORPORATE PERSONS**” which is defined under section 3(7); *means*

- *A Company defined in section 2(20) of the Companies Act, 2013,*
- *A limited liability partnership in section 2(1)(n) of LLP Act, 2008 or*
- *Any other person incorporated within limited liability under law for the time being in force* ***but shall not include any financial provider****;*

Note: Insolvency resolution and liquidation of financial services providers are excluded from the scope of this Act. This is because such entities require a special insolvency regime that is specialized. Example; underwriters, Insurance Companies, banks etc.

Note that it is possible to incorporate an unlimited liability company under the Companies Act, 2013

(Trick: Corporate Insolvency Resolution Process=CIRP)

WHAT is the minimum amount default required for initiation of CIRP process against Corporate Debtor (CD)?

SECTION 4: CIRP against of Corporate Debtor can be initialled where the minimum amount of **DEFAULT** is **One lakh Rupees (Rs. 1, 00,000/-) of debt.** However, the Central Government may specify the minimum amount of default of higher value up to one crore rupees.

Where Section 3(12):"**default**" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

STEPS INVOLVED IN EXECUTION OF CORPORATE INSOLVENCY RESOLUTION PROCESS

1.	Application for CIRP
2.	Action of Adjudication Authority (AA) on receipt of Application
3.	Declaration of moratorium Period
4.	Appointment of Interim Resolution Professional
5.	Public Announcement & meeting submissions of claims
6.	Verification of Determination of Claims
7.	Constitution of Committee of Creditors
8.	Issuance of Notice of the Meeting of Committee of Creditors
9.	Holding meeting of Creditors of Committee
10.	Appointment of Resolution Professional
11.	Preparation of information of Memorandum
12.	Preparation Of Resolution Plan
13.	Submission of resolution plan by the applicant to Resolution Professional
14.	Submission of resolution Plan to AA

When Application for CIRP can be filed?

SECTION 6; An application can be filed by **following person** , when Corporate Debtor has defaulted in paying debt that has become due and payable, but not repaid;

- Financial Creditor or
- Operation Creditor or
- Corporate Applicant itself (includes corporate debtor)

Where,

Section 5(7):	**Section 5(20)**:	**Section 5(5)**:	**Section 3(8)**:
"financial creditor" means any person to whom a **financial debt is owed** and includes **a person to whom such debt has been legally assigned or transferred to**;	"**operational creditor**" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;	"**corporate applicant**" means— (a) corporate debtor; or (b) a member or partner of the corporate debtor who is authorized to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or (d) a person who has the control and supervision over the financial affairs of the corporate debtor;	"**corporate debtor**" means a corporate person who owes a debt **to any person**

INITIATION OF CIRP by FINANCIAL CREDITOR.

Statutory provisions:

1. Section 7 of Insolvency and Bankruptcy Code, 2016
2. Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016
3. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016
4. In accordance with Rules 20,21,22,23,24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.

This section lays down the procedure for initiation of CIRP by "Financial Creditor:"

- Application by Financial Creditor or two or more financial Creditor jointly
- Application to Adjudicating Authority
  Where, Section 5(1) "Adjudicating Authority"*, for the purposes of this Part, means* ***National Company Law Tribunal*** *constituted under section 408 of the Companies Act, 2013;*
- On occurrence of Default

- For this purpose, default includes financial Debt.
  Where, Section 5(8) *"financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*
  (a) Money borrowed against the payment of interest;
  (b) Any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
  (c) Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
  (d) The amount of any liability in respect of any lease or hire purchase Contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
  (e) Receivables sold or discounted other than any receivables sold on nonrecourse basis;
  (f) Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
  (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
  (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
  (i) The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Can a financial creditor in respect of whom there is no default file an application of resolution?

Yes. A financial creditor for whom there is no default can still file an application against a corporate debtor provided, the corporate debtor has a default against some other financial creditor. However, in that case, he can only file joint application with the financial creditor for whom there is default.

INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY), RULES, 2016

Application to NCLT shall be made in **FORM 1 (annexure attached)** with the documents and records as required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016.

Can an assignee of a financial contract make an application under corporate insolvency resolution process?

Yes. As per Regulation 4 of Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016 where an applicant of corporate insolvency resolution is an ***assignee or transferee of a financial contract*** the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documents as may be required to demonstrate the assignment or transfer.

Where Financial Contract means (defined under Rule 3 of (AA) Rules, 2016

Financial contract is a contract between a corporate debtor and a financial creditor which lays down the terms of the financial debt like the tenure of the debt, interest payable and date of repayment etc.

Documents and records to be submitted

	Form 1 *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*	Application by Financial Creditor against Corporate debtor to Initiate CIRP. Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
		Record / evidence of default recorded with the *information utility* ***(Section 3(21): "information utility"*** *means a person who is registered with the Board as an information utility under section 210 ;)*
	Form 2 *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*	Written communication by proposed interim resolution to act as resolution professional in **(annexure attached)** Accompanied by certificate confirming the eligibility of resolution professional
	Form C (*Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016*	Proof of claim by Financial Creditor
	IN case of Joint Application	Authorization letter to act on behalf of all financial creditors in case of joint application.
	Other relevant documents	Financial contract supported by financial statements as evidence of debt a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor; financial statements showing that the debt has not been repaid; or An order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any

Adjudicating Authority

NCLT on receipt of application along with records and documents shall within 14 days ascertain the existence of the default and may either admit or reject the application on the following basis:

Admit such application	Reject the application
Default has occurred **or** Application is complete **and** No disciplinary proceedings pending against the proposed resolution professional as the case may.	No Default has occurred **or** Application is incomplete **and** Any disciplinary proceedings pending against the proposed resolution professional as the case may.
NCLT before rejecting the application shall give notice to the applicant to rectify the defect in his application **with 7 days** of receipt such notice from NCLT.	

When will the insolvency resolution process commence?

The insolvency resolution process will **commence from the date of admission** of application by the Adjudicating Authority. It is referred to as the Corporate Insolvency Resolution Date.

Section 5(11) initiation date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process;

Section 5(12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;

INITIATION OF CIRP by OPERATIONAL CREDITOR.

Statutory provisions:

1. Section 8 and Section 9 of Insolvency and Bankruptcy Code, 2016
2. Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016
3. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016
4. In accordance with Rules 20,21,22,23,24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.

This section lays down the procedure for initiation of CIRP by "Operational Creditor:"

Where Section 5(20):"**Operational creditor**" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 5(21); "**operational debt**" means a **claim in respect of the provision of goods or services** including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority

This **section lays down procedure** which differs from the procedure applicable to financial creditors. As operational debt (such as trade debts, salary or wage claim) tends to be small amounts or are recurring in nature and may not be accurately reflected on the records of *information utility1.* ***(Section 3(21): "information utility" means a person who is registered with the Board as an information utility under section 210 ;).***

This will bring the law in line with international practices, which permits unsecured creditors to file for initiation of insolvency resolution proceedings.

Process for Initiation:

1. On **occurrence** of default (which is first and foremost important event)
2. Serve Demand Notice or copy an invoice demanding payment of the debt in default to corporate debtor.

   *Where For the purposes of this section, a "**demand notice**" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.*

   <u>Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016</u>
   Demand Notice issued in ***Form No. 3 (annexure attached)*** *or*
   Copy an invoice demanding payment in ***Form No. 4 (annexure attached)***

   As per Rule 5(2) *of, the demand notice or a copy of invoice shall be sent to corporate debtor by post, by hand or email and the copy of demand notice shall be forwarded to information utility.*

3. Within the **PERIOD OF 10 DAYS** from the date of notice so served mentioned aforesaid, the **corporate debtor will inform the Operational Creditor** of the existence of dispute regarding the debt claim or of the repayment of the debt.

It ensures informal negotiations between such creditors and corporate debtors, who may result in restructuring of the debt outside the formal proceedings, whose debt are usually smaller

4. On expiry of **ten days; aforesaid** and on not receiving any notice of the dispute or payment due from corporate Debtor; Operational creditor shall initiate CIRP, in such manner accompanied with such fees as prescribed

Documents and records to be submitted

	Form 5 (*Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)*	: Application by Operational Creditor against Corporate debtor to Initiate CIRP. Creditor Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
	Form 3 or Form 4 *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*	Copy of demand notice or invoice already being served to corporate debtor. an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt
	Form 2 *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*	Written communication by proposed interim resolution to act as resolution professional in **(where applicable)** Accompanied by certificate confirming the eligibility of resolution professional
	Form (Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016)	**FORM B** Proof of claim by Operational Creditor other than workmen or employee **FORM D** Proof of claim by workmen or employee **FORM E** Proof of claim by Authorised Representative of workmen or employee **along with Affidavit**
		a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor
	Existence of debt to be proved by documents	(a) the records available with an information utility, if any; or (b) other relevant documents, including – (i) a contract for the supply of goods and services with corporate debtor; (ii) an invoice demanding payment for the goods and services supplied to the corporate debtor; (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; or (iv) Financial accounts.

Adjudicating Authority

NCLT on receipt of application along with records and documents shall within 14 days ascertain the existence of the default and may either admit or reject the application on the following basis:

Admit & Communicate such application	**Reject & Communicate the application**
• Default has occurred **or** • Application is complete • there is no repayment of the unpaid operational debt • the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor • no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility • No disciplinary proceedings pending against the proposed resolution professional as the case may.	• No Default has occurred **or** • Application is incomplete • there is repayment of the unpaid operational debt • the invoice or notice for payment to the corporate debtor has not been delivered by the operational creditor • notice of dispute has been received by the operational creditor or there is record of dispute in the information utility • Any disciplinary proceedings pending against the proposed resolution professional as the case may.
NCLT before rejecting the application shall give notice to the applicant to rectify the defect in his application **with 7 days** of receipt such notice from NCLT.	

INITIATION OF CIRP by CORPORATE DEBTOR.

Statutory provisions:

1. Section 10 of Insolvency and Bankruptcy Code, 2016
2. Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016
3. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016
4. In accordance with Rules 20,21,22,23,24 and 26 of Part III of the National Company Law Tribunal Rules, 2016

This section provides for the intuition of corporate insolvency resolution process by the **corporate debtors itself**. A corporate applicant (defined as a specific set of persons linked to the corporate debtors) may make as an application to the adjudicating authority.

Section 5(5)"**Corporate applicant**" means—
(a) Corporate debtor; or
(b) A member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
(c) An individual who is in charge of managing the operations and resources of the corporate debtor; or
(d) A person who has the control and supervision over the financial affairs of the corporate debtor;

Application to NCLT shall be made in **FORM respectively** with the documents and records as required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016.

Documents and records to be submitted

	Form 6 (*Rule 7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)*	: Application by Corporate applicant to Initiate CIRP. Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
	In case of Financial Debt.	record of default obtained through the information utility or all documents listed in application form 6
	In case of Operational Debt.	(i) copy of invoice / demand notice served by an operational creditor on the corporate debtor and (ii) Record of default obtained through the information utility or all documents listed in serial number 8 of part-III of this application.
	Form 2 *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*	Written communication by proposed interim resolution to act as resolution professional in **(where applicable)** Accompanied by certificate confirming the eligibility of resolution professional
		Copy of the relevant books of accounts Copies of audited financial statements for the last two financial years
	A statement of affairs made up to a date not earlier **than fourteen days** from the date of application including the following document, namely:-	• provisional financial statements for the current financial • a list of the corporate debtor's assets and liabilities • in the case of any property on which a claim against the corporate debtor is wholly or partly secured, particulars of the claim and its amount, and of how and when the security was created; • the names and addresses of the financial creditors and operational creditors of the corporate debtor, with the amounts due to each of them; • particulars of any debts owed by or to the corporate debtor to or by persons connected with it; • whether any and if so what, guarantees have been given in relation to the debts of the corporate debtor by other

		persons, specifying which, if any, of the guarantors, is a related party to the corporate debtor and the corporate applicant; and • the names and addresses of the members and partners of the corporate debtor, as the case may be, with details of their respective shareholdings •

Adjudicating Authority

NCLT on receipt of application along with records and documents shall within 14 days ascertain the existence of the default and may either admit if it is complete or reject the application if it is incomplete.

NCLT before rejecting the application shall give notice to the applicant to rectify the defect in his application **with 7 days** of receipt such notice from NCLT.

Since the corporate applicant can only initiate the corporate insolvency resolution process upon the occurrence of a default and not on mere likelihood of inability to pay debts, the corporate applicant cannot trigger the corporate insolvency resolution process prematurely to (potentially) abuse the moratorium provisions.

Explanation: ***for the purpose this section, a corporate debtor includes a corporate applicant in respect of such corporate debtors****.*

PERSON NOT ENTITLED TO MAKE APPLICATION
SECTION 5(11) OF IBC, 2016

Corporate debtor who

undergoing a corporate insolvency resolution process;	completed corporate insolvency resolution process twelve months preceding the date of making of the application; or	in respect of whom a liquidation order has been made	who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or ***(same applicable to financial creditor)***

On the admission of Application under Section 7(1) or Section 9(1) or Section 10(1) as the case may be, the Corporate insolvency resolution Process will be commenced regarded as “Insolvency Commencement Date” under Section 5 (12) which will be same for all the three cases, respectively, same will be discussed in my next article.
Hope this is article simplifies the conceptuality.

Hope my article helps you all for conceptual and procedural clarity. Any other suggestions /opinions are welcomed. Free to contact me for specific formats

CS ANJALI GORSIA
(MEM NO: A49601)

(Author-CS Anjali Gorsia, Company Secretary in Practice from Nagpur (Maharashtra) and can be contacted at ***csanjali.gorsia@gmail.com****)*